UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 19

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| STAR WEST SATELLITE, INC., | ) | |
| | ) | |
| Respondent | ) | |
| | ) | Case No. 19-CA-133107 |
| and | ) | Case No. 19-CA-135489 |
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| INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 206 affiliated with INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, | ) | |
| | ) | |
| Charging Party. | ) | |

**REPLY IN FURTHER SUPPORT OF RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

## I. Introduction

In its Opposition to Star West's Motion for Partial Summary Judgment, the General Counsel asserts that collateral estoppel is not appropriate here because, insofar as scheduling was concerned, Judge Meyerson's decision in *Star West I* was "specific to [Mr.] Severson in Helena" and the facts here "are materially different from those involving Severson." The General Counsel is wrong on both points.

First, Judge Meyerson's findings in *Star West I*[1] were not specific to Mr. Severson or the Helena location. After hearing testimony from several witnesses, including a technician who worked at the Nampa facility (Levi Brillman), Judge Meyerson found that "[t]he technicians who work for Respondent are aware that the nature of the Respondent's business requires maximum

[1] Judge Meyerson's opinion in the previous litigation, *Star West I*, is attached to Star West's Memorandum of Law in Support of its Motion for Partial Summary Judgment as Exhibit 4.

flexibility in scheduling in order to meet the demands of Dish Network, which varies considerably from day to day," and that "[t]he Respondent's actions regarding Severson's work schedule was no different that its standard past practice for all technicians." *Star West I* at 20 and 21 (emphasis added). Based on his finding that Star West had a past practice of requiring maximum scheduling flexibility, Judge Meyerson rejected four different claims related to schedule changes in *Star West I* (expanded use of subcontractors, change to 10-hour days, change to three-day workweek, and the change regarding Severson's schedule, which deprived him of planned day off). Therefore, Judge Meyerson's findings in *Star West I* regarding a company-wide past practice undoubtedly encompassed employees at the Nampa facility.

Second, Judge Meyerson's decision regarding Mr. Severson applies with equal force to the employees who will testify in this case. Judge Meyerson ruled that Star West had the right to unilaterally change Mr. Severson's schedule, even though it deprived him of his scheduled day off, because Star West's established company-wide practice requiring maximum flexibility and changing schedules to satisfy the demands of its customer, Dish Network, reasonably encompassed such schedule changes. Whether Star West had made that particular type of change in the past was not the basis for Judge Meyerson's decision. Therefore, it cannot be the basis for avoiding the collateral estoppel effect of his decision.

Third, the General Counsel does not say it will produce any evidence to show that the facts Judge Meyerson relied upon to reach his decision - Star West's need for maximum flexibility in scheduling to accommodate its customer's demands and its practice of making various schedule adjustments - have changed. Instead, the General Counsel intends to re-argue Judge Meyerson's decision with testimony from Nampa employees that Star West "never required them to work on their established days off." That "evidence" is not new and, even if

true, does not change the essential facts upon which Judge Meyerson found a company-wide past practice of requiring maximum flexibility in scheduling. Therefore, the factual differences the General Counsel points to are legally insufficient to avoid the application of collateral estoppel.

## II. Argument

### A. The General Counsel Mistakenly Focuses On Alleged Differences Between The Employees Involved In The Two Proceedings Rather Than the Commonality of the Underlying Issues.

The General Counsel wrongly argues that collateral estoppel does not apply because *Star West I* was confined to a schedule change that involved only one employee at a different facility.

First, Judge Meyerson's relevant findings were not confined to Mr. Severson or the Helena facility where he worked. Much to the contrary, Judge Meyerson held "Respondent's actions regarding Severson's work schedule was not different than its standard past practice for all technicians." *Id.* at 21 (emphasis added). In defining that past practice, Judge Meyerson considered testimony regarding four scheduling-related claims from employees at several locations, including Nampa. These claims challenged Star West's use of additional subcontractors, implementation of a new ten-hour workday, changes to Mr. Severson's schedule that deprived him of his established day off, and a change from a four-day to a three-day workweek (at the Nampa facility).

Judge Meyerson dismissed all four claims, finding that Star West was not obligated to bargain over the changes because it had a company-wide past practice of requiring maximum flexibility from its technicians and making schedule changes as needed to accommodate the demands of its sole customer, Dish Network. In reaching these conclusions, Judge Meyerson made the following key findings:

- "Of particular significance is the fact that the number of jobs that are distributed each day by Dish [Star West's only customer] varies greatly." *Star West I* at 4.

- "Brillman [a technician who worked at the Nampa facility] acknowledged that in Respondent's business, the demand for installation ebbs and flows. There is a significant variation in the amount of work available ...." *Id* at 14.

- "The realities of the ebbs and flows of the Respondent's business seems to comport with the credible testimony of [Company-wide] Operations Manager Bieri . . . ." *Id.* at 14.

- "The technicians who work for Respondent are aware that the nature of the Respondent's business requires maximum flexibility in scheduling in order to meet the demands of the Dish Network, which varies considerably from day to day." *Id.* at 20 (emphasis added).

- "The Respondent is unaware from day to day just how many orders for installation and repair it will receive from the Dish Network. In order to meet this uncertain demand, the Respondent . . . expects its own technicians to exercise maximum flexibility so as to be able to work the varying number of hours necessary to get the job done. This has been the past practice of the Respondent and its work force, and I have seen no credible, probative evidence that this practice has changed with the onset of union representation." *Id.* (emphasis added).

- "[E]ven if not entirely voluntary on Severson's part, the necessity of working extra days or hours is nothing more than the continuation of Respondent's past practice of requiring maximum scheduling flexibility on the part of its employees . . ." *Id.* at 20-21 (emphasis added).

- "The Respondent's actions regarding Severson's work schedule was no different than its standard past practice for all technicians. They were expected to work the necessary hours to accomplish their assigned job tasks." *Id.* at 21 (emphasis added).

- "[T]here has been no change in the Respondent's past practice regarding work schedule changes. . ." *Id.* at 21 (emphasis added).

- "In any event the record clearly established the fluctuating nature of the Respondent's business .... The reduction in the work week in Nampa from four days to three days starting in March of 2013 is certainly in line with the normal ebb and flow of the Respondent's business ... and did not constitute a change in past practice that required the Respondent to consult and negotiate with the Union." *Id.* at 28 (emphasis added).

Based on the plain language of the quoted excerpts, it cannot seriously be argued that Judge Meyerson's findings are specific to Severson or the Helena facility.

Second, by focusing on the differences among individual employees rather than the common legal issues in *Star West I* and this case, the General Counsel appears to confuse the doctrine of res judicata (claim preclusion) with collateral estoppel (issue preclusion). Res judicata bars a party from re-litigating claims made in a prior proceeding. Collateral estoppel bars a party from re-litigating *issues* that were material to the outcome of the prior proceeding. *Sabine Towing & Transp. Co.*, 263 NLRB 114, 120 (1982) (citing *Montana v. United States*, 440 U.S. 147, 153-154 (1979)).

The differences among the employees alleging unlawful schedule changes are not relevant. The Supreme Court and the Board do not require 'factual stasis' between the first and second proceedings before collateral estoppel applies." *Id.* (citing *Montana*, 440 U.S. at 153-54). In fact, "the two relevant proceedings in Montana were based on different contracts with different provisions but the Supreme Court concluded that this difference was not material to the outcome reached in the first proceeding which served to bar the second proceeding." *Id.* (citing *Montana*, 440 U.S. at 153-54) (emphasis added). What matters is that in both cases, the critical issue – whether Star West has a past practice of requiring maximum flexibility from its technicians and making schedule changes given the demands of its customer – is the same.

### B. The "Evidence" The General Counsel Seeks to Rely Upon Does Not Undermine the Application of Collateral Estoppel.

The General Counsel seeks to have certain employees testify that Star West has not previously changed their schedules at Nampa in such a way that it would interfere with their scheduled days off; however, that evidence, even if true, misses the point.

First, as described above, Judge Meyerson found that Star West could change Mr. Severson's schedule without bargaining, even though the change affected Severson's scheduled day off, because Star West's actions regarding Severson "was no different than its standard practice for all technicians. They were expected to work the necessary hours to accomplish their assigned job tasks." *Star West I* at 21. Accordingly, Judge Meyerson's finding that Star West's company-wide practice was broad enough to encompass schedule changes that affected established days off was not facility specific and, therefore, necessarily precludes the General Counsel from pursuing similar allegations at any other location.

Second, to the extent the General Counsel seeks to make an argument specific to Nampa, the General Counsel overlooks the fact Judge Meyerson's conclusions regarding Star West's company-wide past practice were based in part on testimony from and applied to bargaining unit employees in Nampa. Judge Meyerson found that at Nampa, "the record clearly established the fluctuating nature of Respondent's business." *Star West I* at 28. He noted that Nampa Technician Levi Billman "acknowledged that traditionally the workload at the Nampa facility fluctuated 'quite a bit.'" *Id.* at 27. On these facts, he concluded that Star West was not required to bargain over a schedule change at the Nampa facility – a reduction from four to three days a week. The key to that finding – Star West's need for maximum flexibility and practice of making schedule changes – now applies to the General Counsel's assertion that Star West must bargain over a schedule change at Nampa simply because it affects a planned day off.

Third, the General Counsel's argument that employees at the Nampa facility will testify that, while Star West had changed their schedules in the past, it did not do so in a way that interfered with their established days off, reflects a misunderstanding of Judge Meyerson's decision. Judge Meyerson did not dismiss the General Counsel claims in *Star West I* because

Star West proved that it had made those exact changes in the past. Instead, he ruled in favor of Star West because he found Star West's practice was broad enough to encompass a wide variety of schedule changes, one of which deprived an employee of an established day off. Therefore, the General Counsel's proffered testimony will not alter the collateral estoppel effect of *Star West I.*

Fourth, the General Counsel states it is "prepared to present evidence that the circumstances of these changes differs (sic) from that of Severson, such as demonstrating a lack of voluntariness, found material by Judge Meyerson in regard to Severson." This argument fails because Judge Meyerson did not find voluntariness material. Instead, he found that "even if not entirely voluntary on Severson's part, the necessity of working extra days or hours is nothing more than the continuation of Respondent's past practice of requiring maximum scheduling flexibility on the part of its employees . . ." *Star West I,* above at 20-21 (emphasis added).

Finally, if necessary, Star West would defend the General Counsel's allegations by having its witnesses testify again to its need for maximum flexibility and its practice of making schedule changes in a wide variety of circumstances, including the four upheld by Judge Meyerson. Thus, to prevail here, the General Counsel would need to have the Judge discredit testimony that Judge Meyerson already credited. This is exactly what collateral estoppel is designed to prevent.

### C. The General Counsel's Legal Analysis Relies On An Incorrect Factual Claim And Highlights The Need For Collateral Estoppel In This Case

The General Counsel's attempt to distinguish the case law Star West relies upon fails largely because of the false assertion that the findings in *Star West I* were limited to the

"Severson facts in Helena, Montana." As explained above, this argument is contradicted by the plain language of Judge Meyerson's opinion.

The cases on which Star West relies show that collateral estoppel is appropriate where, as here, there is no plan to present evidence of any material changes to the facts that were dispositive in the first proceeding. In *Sabine*, for example, collateral estoppel applied because the General Counsel "failed to show that the relevant circumstances were materially different in 1976 than they were in 1971." 263 NLRB at 121-22. It is no surprise that here, just over a year later, the General Counsel similarly show or even allege a material difference in the facts upon which Judge Meyerson relied in *Star West I*: Star West's need for maximum scheduling flexibility and its practice of making a variety of schedule changes to accommodate that need.

The need for collateral estoppel in this case is further highlighted by the General Counsel's mistaken attempt to distinguish *American Model & Pattern*, 277 NLRB 176 (1985) on procedural grounds. The fact that collateral estoppel was sought and applied after a hearing in that case has no bearing on Star West's pre-hearing motion. The only relevant procedural difference between *American Model* and this case is the difference between offensive and defensive collateral estoppel. In *American Model*, the General Counsel offensively estopped the employer from denying a past practice of considering seniority in layoffs because, in prior litigation, an ALJ determined the employer routinely considered seniority in layoffs. The prior litigation addressed the discriminatory layoff of only one employee (Harrington), where the subsequent litigation addressed the layoffs of several employees. Here, Star West seeks to apply collateral estoppel defensively. It is hornbook law that offensive collateral estoppel is more difficult to apply than defensive collateral estoppel. Thus, *American Model* only highlights the need for *defensive* collateral estoppel in this case to preclude the General Counsel's attempt to

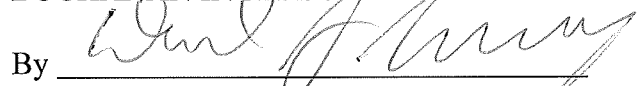
re-write a prior decision on the Company's past practice, under the guise that such past practice applied to only one employee.

## III. Conclusion

Collateral estoppel precludes the General Counsel from advancing what is essentially an appeal of Judge Meyerson and the Board's determination that Star West's changes to bargaining-unit employees' schedules was within the scope of Star West's practice of requiring maximum flexibility from its technicians so that it can meet the demands of its customer. This finding was not specific to any one employee or location and none of the facts upon which Judge Meyerson or the Board relied have changed in any material way since November 2013. Accordingly, partial summary judgment should be granted in favor of Star West as to Paragraphs 7(a) and 10 of the General Counsel's Complaint.

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY P.C.

By 

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## CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 2015, a true and correct copy of the foregoing **Reply in Further Support of Motion for Partial Summary Judgment** was filed and served via http://www.nlrb.gov/e-filing system and U.S. mail, and was also served, via first-class U.S. mail, postage prepaid on:

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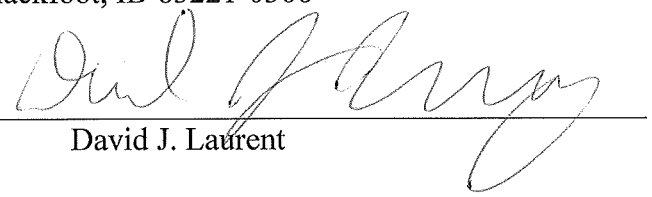

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